U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14736194

Date: JUL. 01, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a marketing manager, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that while the Petitioner established eligibility for the underlying EB-2 immigrant visa classification as a member of the professions holding an advanced degree, the record did not establish that a waiver of the classification's job offer requirement would be in the national interest. On appeal, the Petitioner submits new evidence and asserts that he merits a national interest waiver.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the decision and remand this matter for the entry of a new decision consistent with the analysis below.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[2]

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] To establish that it would be in the national interest to waive the job offer requirement, a petitioner must go beyond showing their expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines 'exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute. individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, they must go beyond demonstrating a degree of expertise significantly above that ordinarily encountered in their field of expertise to establish eligibility for a national interest waiver. *See Dhanasar,* 26 I&N Dec. at 886 n.3.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge, and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

The Petitioner submitted evidence that he has served as a business manager and executive in the area of marketing for several firms over the past three decades, mainly in Brazil. He earned a Master of Business Administration degree from [redacted] University in 1985. Although not mentioned in the Director's decision, this evidence establishes that he qualifies for the underlying EB-2 visa classification as a member of the professions holding an advanced degree. Therefore, the sole remaining issue is whether he qualifies for and otherwise merits a waiver of the job offer requirement, and thus of a labor certification.

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner did not describe his proposed endeavor with his initial filing, but referred in broad terms to the value of his marketing expertise to the United States. In response to the Director's request for evidence, he provided a statement in which he described the dual nature of his proposed endeavor. He first mentioned that he has developed a marketing plan for an online fashion jewelry business, "to be executed in 2020 using personal funds for the initial capital," and submitted a copy of this marketing plan. The Petitioner also names two companies that "are interested in utilizing my marketing services as a consultant," and submitted letters from these companies expressing interest in his services as an outside marketing consultant.

Regarding the substantial merit of the Petitioner's proposed endeavor, the Director stated in his decision that it may be demonstrated through either "the potential to create a significant economic impact," or through "research in a critical area of need such as cancer, or clean air." However, this statement improperly limits the consideration of substantial merit to two specific factors, whereas the *Dhanasar* decision states that merit "may be demonstrated in a range of areas such as business,

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

entrepreneurialism, science, technology, culture, health, or education." In addition, the decision further states that the potential to create a significant economic impact "may be favorable but is not required." The Director's decision thus imposes a higher burden on the Petitioner to establish the substantial merit of his endeavor than is required under the *Dhanasar* framework.

In addition, the Director wrote in his decision that "the term Substantial [*sic*] is not superfluous," but did not provide an analysis of the substantiality of the merit of the Petitioner's proposed endeavor. While we agree that the term "substantial" has meaning, the Director did not then explain why the endeavor's merit was insufficiently substantial, but listed arguments that the Petitioner had made in support of the first prong. An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(i); see also *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994)(finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). On remand, the Director should consider whether the Petitioner's proposed endeavor has substantial merit within the *Dhanasar* framework, and provide an analysis of the factors considered in making his decision.

The Director also misapplied the *Dhanasar* framework in determining that the Petitioner's proposed endeavor is not of national importance. He states that the Petitioner "has gone on record" that he has been retired since 2016, apparently arriving at this conclusion based upon the record of the Petitioner's employment included on Form G-325A. We first note that, as the Petitioner points out on appeal, the record does not include such a statement, and the Director improperly relied upon an inference in reaching this conclusion. In addition, although the Petitioner's current employment may shed light upon and support his proposed endeavor, the *Dhansar* decision is clear that it is the potential of the prospective endeavor which is considered under the first prong.[4] Therefore, on remand the Director should evaluate the proposed endeavor's potential prospective impact as stated in the record to determine whether it is of national importance.

B. Whether the Petitioner is Well Positioned at Advance the Proposed Endeavor

As stated above, we consider several factors in determining whether a petitioner has established that they are well positioned to advance their proposed endeavor, including, but not limited to, a petitioner's:

- the individual's education, skills, knowledge, and record of success in related or similar efforts;
- a model or plan for future activities;
- any progress towards achieving the proposed endeavor; and,
- the interest of potential customers, users, investors, or other relevant entities or individuals.

However, the Director stated that the second prong "focuses on whether the beneficiary has the qualifications to do what he has stated he can do in the field." This statement improperly limits the factors considered to only one or two of those specifically listed in *Dhanasar*, in addition to foreclosing consideration of other factors not included in that inexhaustive list.

[4] *Dhanasar* at 889 ("In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.")

In addition, the Director again relied upon his incorrect assertion that the Petitioner states that he has retired in evaluating whether he is well positioned to advance his proposed endeavor. Here, although the Petitioner's recent employment history is an important factor in making that determination, on remand the Director must consider and analyze all of the evidence in the record pertaining to the second prong of the *Dhanasar* framework.

C. Whether on Balance it Would be in the National Interest to Grant a Waiver

As the Director did not conclude that the Petitioner met the first two prongs of the *Dhanasar* framework, he determined that it would not be in the national interest to grant a waiver of the job offer requirement, and thus a labor certification. On remand, if he determines after reconsideration and analysis that the Petitioner meets the first two prongs, the Director should evaluate the Petitioner's statements and evidence in support of the third prong.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.